IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MICHAEL JACKSON **APPELLANT**

V. **CAUSE NO. 2013-CA-00434-COA**

ROSIE JACKSON **APPELLEE**

REPLY BRIEF OF APPELLANT

R. Shane McLaughlin (Miss. Bar No. 101185)
Nicole H. McLaughlin (Miss. Bar No. 101186)
McLaughlin Law Firm
338 North Spring Street Suite 2
Post Office Box 200
Tupelo, Mississippi 38802
Telephone: (662) 840-5042
Facsimile: (662) 840-5043
rsm@mclaughlinlawfirm.com

ATTORNEYS FOR APPELLANT

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES AND SECONDARY MATERIALS

STATEMENT REGARDING ORAL ARGUMENT

The grant of a divorce in this case expands the ground of habitual cruel and inhuman treatment. If a divorce is affirmed in this case, divorce will be proper under this ground based on isolated occurrences of conduct that allegedly occurred more than two decades before the parties' separation. Similarly, affirming a divorce on this record will eviscerate the requirement that the alleged conduct cause a substantial subjective effect on the complaining spouse.

Aside from the paucity of admissible proof supporting a divorce, the Chancellor made a clear-cut mathematical error which resulted in the undervaluing of the Wife's distribution and the award of alimony.

Oral argument should be granted to discuss these issues.

REPLY ARGUMENT I.

THE CHANCELLOR ERRED IN GRANTING A DIVORCE BASED ON HABITUAL CRUEL AND INHUMAN TREATMENT.

A. Inadmissible Evidence of Homosexual Acts.

As discussed below, even if Rosie had proven the alleged marital fault with admissible evidence, her proof would fall short of that needed for divorce. However, Rosie used inadmissible hearsay to prove her tenuous grounds.

As argued in Michael's principal brief, the Chancellor relied on dubious testimony regarding out-of-court statements made by Ace Pulliam. Rosie was allowed to testify that Pulliam told her about homosexual acts with Michael. (T. p. 74). The Chancellor concluded that the evidence was not hearsay because Michael was in same room that Rosie was in while Rosie was on the telephone with Pulliam, the declarant. (T. p. 71-73).

In her Brief, Rosie responds to this argument in two sentences, by asserting, without citation to authority, that because Michael was allegedly present at the time of Pulliam's statements, the statements were not hearsay. (Brief of Appellee at 11). This is simply incorrect. Hearsay is any out-of-court statement offered to prove the truth of the matter asserted. MISS. R. EVID. 801(c). Another party's alleged presence at the time of an out-of-court statement is not an exception to the hearsay rule. *See* MISS. R. EVID. 803. A Chancellor's decision based on such inadmissible hearsay evidence must be reversed. *J. L. W. W. v. Clarke County Dep't of Human Servs*., 759 So. 2d 1183, 1186 (Miss. 2000).

Rosie's testimony about what Pulliam said was not a non-hearsay statement under Rule 801(d)(1) or (d)(2) and Rosie does not claim otherwise. No possible hearsay exception or exclusion saves Rosie's testimony about what Pulliam told her.

Rosie's testimony as to what Pulliam told her was rank hearsay. Admitting this testimony over contemporaneous objection, and considering it in granting the divorce, was clear error. For this reason alone, the grant of divorce should be reversed.

Rosie claims in her Brief that the Chancellor did not consider Alma's hearsay testimony regarding Pulliam's alleged statements to her. The Transcript reflects that the Chancellor initially sustained an objection to this testimony, then reversed that ruling and overruled the hearsay objection. (T. p. 338, 350-51). The testimony was admitted as substantive evidence at trial. (T. p. 350-51).

The Chancellor's opinion also purports to "reverse" the ruling as to some part of Alma's testimony. (C.P. p. 77). While it is clear that Alma's testimony was inadmissible hearsay, it is unclear to Michael to what extent the Chancellor was reversing himself in the second instance. However, in any event, this evidence is clearly not the same as Rosie's hearsay testimony regarding Pulliam's statements. All Parties agree that evidence was admitted and considered by the Chancellor.

Rosie had weak evidence of an alleged decades-old homosexual act by Michael to begin with. Without the hearsay evidence, Rosie's proof falls far short of what this Court requires to affirm a divorce. Because the Chancellor erred by admitting the hearsay evidence, the grant of divorce should be reversed and rendered.

B. No Evidence of Routine and Continuous Conduct.

The Supreme Court has held that "[a]s a general rule, the habitual cruel and inhuman treatment must be shown to be routine and continuous." *Boutwell v. Boutwell*, 829 So. 2d 1216, 1221 (Miss. 2002). However, concededly, the Court also stated that "a single occurrence may be grounds for a divorce on this ground." *Boutwell*, 829 So. 2d at 1221.

There is no evidence of "routine and continuous" misconduct by Michael in the Record. There is dubious evidence of homosexual activity twenty-six years prior, and Alma's testimony that she heard Michael request oral sex from a man in 2008. Even if this were sufficient evidence to prove habitual cruel and inhuman treatment, the alleged conduct was not shown to have been sufficiently routine and continuous to warrant a divorce. Accordingly, for this reason, the divorce should be reversed and rendered.

C. No Evidence of a Causal Connection or Sufficient Subjective Effect on Rosie.

Just as referenced in Michael's principal Brief, Rosie relies on generic testimony of elevated blood pressure, blood sugar and high cholesterol and an anti-anxiety medication to meet this required proof.

Mississippi law requires a causal connection between the alleged marital misconduct and the claimed effects on the offended spouse. *See, e.g., Faries v. Faries*, 607 So. 2d 1204, 1209 (Miss. 1992) (evidence of an "impact of the conduct on the plaintiff is crucial"). This Court will reverse a divorce based on habitual cruel and inhuman treatment where there was insufficient evidence of physical or mental harm on the complaining spouse. *Anderson v. Anderson*, 54 So. 3d 850, 854 (Miss. Ct. App. 2010). Flimsy self-serving allegations are insufficient to support a divorce. *See, e.g., Potts v. Potts*, 700 So. 2d 321, 323 (Miss. 1997); *Reed v. Reed*, 839 So. 2d 565, 572 (Miss. Ct. App. 2003).

The trouble with Rosie's argument is that there is no evidence in the record of a causal connection between any misconduct by Michael and her claimed subjective maladies. If a Mississippi spouse is allowed to meet this requirement by simply testifying that her cholesterol increased because of her spouse's misconduct, the causal connection requirement will be a dead letter.

There is no evidence whatsoever in the record to prove a causal connection between the vague allegations of the subjective effect on Rosie and the conduct which Rosie claimed. In fact, the evidence refutes this contention. The undisputed evidence established that Rosie "learned" of Michael's alleged homosexual activity in April 2008, but stayed in the marital home for almost another year before she moved out in February 2009. It is illogical that Rosie continued to subject herself to such harms as anxiety, increased blood pressure and high cholesterol, by choosing to continue to live with Michael for almost one year after she learned of his alleged acts.

The Chancellor erred by finding Rosie proved a sufficient subjective effect and a causal connection between Michael's alleged conduct and any effect on her. Accordingly, for this reason as well, the grant of divorce should be reversed and rendered.

REPLY ARGUMENT II.

THE MATHEMATICAL ERROR CAUSED THE CHANCELLOR TO UNDERVALUE ROSIE'S ESTATE.

Rosie's Brief makes no substantive response to this assignment of error, but instead sets up a straw man to attack.

It is undeniable from the Record that the Chancellor undervalued Rosie's estate by counting the mortgage indebtedness twice. The Chancellor began his analysis by concluding that Rosie received the equity in the home, amounting to $27,897 (the value of $78,000 minus the mortgage debt of $50,103). (C.P. p. 83). However, the Chancellor then again reduced the amount of Rosie's distribution by the mortgage indebtedness of $50,103. (C.P. p. 85). The Chancellor subtracted the mortgage debt from Rosie's distribution twice. This resulted in the Chancellor erroneously concluding that Rosie's estate had a "negative value" of $18,175.

While Rosie argues, without explanation, that Michael is "incorrect" that the mortgage debt was counted twice, she alternatively argues that this error was somehow "harmless" (Appellee's Brf. at 21 n. 9). However, as discussed below, the disparity in the parties' respective distributions was the reason for the alimony award. Because the Chancellor miscalculated Rosie's distribution, the Court awarded alimony. The error is not harmless under this circumstance, but caused an alimony award that otherwise would not be justified.

While Rosie spills much ink attempting to distinguish *Coggins* from this case, her analysis is unavailing. *Coggins* stands for the indisputable proposition that this Court will reverse a Chancellor based on a mathematical error that effects the award. *Coggins v. Coggins*, 81 So. 3d 285, 288 (Miss. Ct. App. 2012). A mathematical error requires reversal here, just as the error did in *Coggins*.

A Chancellor's decision must be reversed where the Chancellor double counts marital indebtedness. *Watson v. Watson*, 882 So. 2d 95, 99 (Miss. 2004). The Chancellor double counted the mortgage indebtedness in this case. Accordingly, the division of assets should be reversed.

REPLY ARGUMENT III.

THE ALIMONY AWARD WAS THE RESULT OF THE MISCALCULATION OF ROSIE'S DISTRIBUTION FROM THE MARITAL ESTATE.

The Chancellor made clear that the disparity in the parties' respective distributions from the marital estate was a reason he was awarding lump sum alimony. (C.P. p. 84, 89). As discussed above, the Chancellor necessarily miscalculated Rosie's distribution because the Chancellor reduced her distribution by the amount of the mortgage indebtedness twice.

Where a property division is reversed an accompanying award of alimony must also be reversed. *See, e.g., McKissak v. McKissack*, 45 So. 3d 716, 723 (Miss. Ct. App. 2010); *Gray v. Gray*, 909 So. 2d 108, 112-13 (Miss. Ct. App. 2005). *See also* BELL ON MISSISSIPPI FAMILY LAW § 9.01 (2d Ed. 2011) (noting that "when a court's division of marital property is reversed, an accompanying award or denial of alimony must also be reversed."). Accordingly, the Court need go no further than this to reverse the alimony award.

The basis for the Chancellor's award of lump sum alimony in this case was a perceived disparity between the Parties' respective distributions of the marital estate. However, this disparity does not exist when the distributions are correctly calculated. The Court erroneously concluded that Rosie's distribution of the marital estate had a value of *negative* $18,175, which justified an award of lump sum alimony.

Rosie's arguments in favor of the alimony award miss the mark. Michael is not arguing that the alimony award should act to reduce his distribution as Rosie contends. (Appellee's Brf. at 17). Michael argues that the Chancellor used a miscalculated distribution of the marital estate to award alimony in the first place. The Chancellor undervalued Rosie's distribution because he erroneously counted the mortgage indebtedness twice.

Similarly, Rosie argues that the alimony should be affirmed because its purpose is to "equalize" the parties' respective distributions. While this is true, as far as it goes, the argument misses the point. Rosie's distribution, upon which alimony was based, was the product of a miscalculation. The Chancellor was setting about to equalize distributions which were miscalculated.

The Record makes clear that the Chancellor under-valued Rosie's distribution by $50,103 by subtracting the mortgage debt from her distribution twice. The Chancellor awarded lump sum

alimony in the amount of $57,680.32 based on this miscalculation. A correct calculation of the assets awarded to each party would not justify any award of lump sum alimony to Rosie.

Since the property distribution and award of alimony was the product of a significant miscalculation and undervaluing of Rosie's estate, both of the Trial Court's decisions in this regard should be reversed.

CONCLUSION

Accordingly, as explained above and in Michael's principal Brief, the Chancellor's decision to grant a divorce in this case should be reversed and rendered. Alternatively, if the grant of a divorce is affirmed, the Chancellor's property distribution and award of lump sum alimony should be reversed and remanded.

RESPECTFULLY SUBMITTED, this the 12th day of March, 2014.

MCLAUGHLIN LAW FIRM

By: /s/ R. Shane McLaughlin
R. Shane McLaughlin (Miss. Bar No. 101185)
Nicole H. McLaughlin (Miss. Bar No. 101186)
338 North Spring Street Suite 2
P.O. Box 200
Tupelo, Mississippi 38802
Telephone: (662) 840-5042
Facsimile: (662) 840-5043
E-mail: rsm@mclaughlinlawfirm.com

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Reply Brief of Appellant** to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

Hon. Talmadge D. Littlejohn
Chancellor
Post Office Box 869
New Albany, Mississippi 38652

Luanne Stark Thompson
Attorney at Law
Post Office Box 360
Amory, MS 38821-0360

This the 12th day of March, 2014.

/s/ R. Shane McLaughlin

CERTIFICATE OF FILING

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Reply Brief of Appellant** via the Court's MEC e-filing system.

This, the 12th day of March, 2014.

/s/ R. Shane McLaughlin